

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 18, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

Nos. 95-3424 and 96-3670

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PENNY L. CLAUER,

PETITIONER,

**WESTERN WISCONSIN LEGAL SERVICES,
AND THOMAS J. KELLY,**

APPELLANTS,

V.

**LAFAYETTE COUNTY AND LAFAYETTE COUNTY
DEPARTMENT OF HUMAN SERVICES,**

RESPONDENTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Lafayette County:
WILLIAM D. JOHNSTON, Judge. *Reversed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

VERGERONT, J. Western Wisconsin Legal Services and Attorney Thomas J. Kelly appeal from judgments entered against them for attorney fees incurred by Lafayette County. The trial court concluded that Attorney Charles Kreimendahl, an attorney employed by Western Wisconsin Legal Services, advanced frivolous claims on behalf of Penny Clauer by requesting judicial review of the decision of Lafayette County Department of Social Services denying her claim for general relief medical benefits.¹ The court also concluded that Kreimendahl and Attorney Thomas Kelly² advanced frivolous claims in moving for relief from judgment. We conclude the attorneys did not advance frivolous claims in either instance and therefore reverse both judgments awarding attorney fees.

BACKGROUND

Agency Decisions

On February 9, 1994, Clauer filed an application for general relief with Lafayette County Department of Human Services. She was twenty-three years old at the time, unemployed, had no income, and lived with her parents. Her parents' total income was \$1,433 from a veteran's pension and Supplemental Security Income benefits. Her application stated that she was unable to work due to lower back pain and numbness in her legs. It also stated that her parents were paying a monthly premium of \$154 for HMO coverage for her. By checking off certain listed items, Clauer requested general relief

¹ General relief is a state-mandated and county-administered benefit program governed by statute. See *Clark v. Milwaukee County*, 188 Wis.2d 171, 180, 524 N.W.2d 382, 385 (1994), and §§ 49.001-49.043, STATS., 1993-94. All references to §§ 49.001 through 49.043 are to 1993-94 Wis. Stats., which contain the statute in effect at the time pertinent to this appeal. This statute was amended by 1995 Acts 18 and 27 § 2646b-2749, effective January 1, 1996.

² Thomas Kelly represented Western Wisconsin Legal Services on the motion for relief from the judgment imposing attorney fees on Western Wisconsin Legal Services and in opposition to the second motion for attorney fees.

payment for “medical/dental, \$125 per month for shelter, and for other needs.” When she applied, Clauer was given a copy of “County General Relief Program, Policies and Procedures” which stated in pertinent part that “upon determination of eligibility, an applicant may be qualified for one or more categories of aid ... medical/dental services (prior authorization system unless emergency medical/dental situation) ... and that “[t]here is no provision for the payment of back bills. Only current needs can be considered.”

On February 23, 1994, the County sent her a notice of denial:

This correspondence is to inform you that the Lafayette County General Relief Program has reviewed your application form and rendered a determination pertaining to eligibility for maintenance benefits. (shelter, food, utilities, etc.)

You are ineligible for benefits under the county General Relief Program due to the fact that the household income and asset level exceeds the allowable standard for a three member household for purposes of eligibility. Income guidelines for a three member household are \$353/mo.

You may qualify for emergency medical benefits, should you need this service in the future.

Clauer appealed on the ground that the County improperly considered her parents’ income. At the hearing on March 16, 1994, before an administrative review panel, Clauer testified that she lived with her parents and had an agreement to pay between \$100-\$150 in rent to them; she ate separately from her parents and purchased her own food; she had no income and had gone without food, household/personal items and dental care; her parents were paying for her health insurance, and she had applied for social security disability. The review panel upheld the County’s decision. It concluded that Clauer was ineligible for nonmedical benefits because of excess income and that she had health insurance, and therefore no medical needs.

Apparently Clauer appealed this decision to the circuit court, and after subsequent litigation and negotiation, the County found Clauer eligible for shelter benefits for February through September of 1994, but reaffirmed its denial of medical benefits for that time period.³ The review panel held another hearing on November 7, 1994, to address this issue.

At the hearing, Clauer argued that § 49.01(5)(m), STATS.,⁴ states that general relief covers medical and dental services and that § 49.043, STATS.,⁵ allows the County to pay the premiums for health insurance policies for unemployed persons. Clauer testified that her parents paid \$154 per month for an HMO insurance premium for her and after the County denied her benefits in February of 1994, her parents continued the payment as a loan to her. Clauer testified that although the notice of denial stated that she might qualify for medical relief, no one told her to report her medical appointments or expenses and she did not report them because she did not think she was eligible. She submitted bills for \$744.21 for medical expenses that she incurred between February and September of 1994, all but \$25 of which was paid by insurance. Clauer also stated that

³ The record does not contain a copy of the petition for judicial review of the March 16, 1994 agency decision or the decision of the trial court, if any. We rely on Clauer's brief for this description of the procedural background since the County does not dispute it.

⁴ Section 49.01(5)(m), STATS., 1993-94, provides in pertinent part:

General Relief means such services, commodities or money as are reasonable and necessary under the circumstances to provide food, housing, clothing, fuel, light, water, medicine, medical, dental, and surgical treatment.

⁵ Section 49.043, STATS., 1993-94, states:

Any municipality or county may purchase health or dental insurance for unemployed persons residing in the municipality or county. (Statute is no longer in effect).

although she lives in her parents' home, she was independent of her parents and had no access to their income.

The County, however, argued that when Clauer applied for general relief benefits she showed no medical needs and did not submit any medical bills. The County stated that at the time of her application Clauer received a general relief policy and procedure manual which stated that non-emergency medical needs had to be preauthorized. The County repeated its previous contention that Clauer did not have a need for medical benefits because she was covered by an HMO. The County argued that although § 49.043, STATS., states that the County "may pay for health insurance for unemployed residents," the word "may" means may or may not, and it has elected not to pay for insurance premiums as part of its general relief cost containment plan, which was submitted and approved by the state. The County did not point to anything in writing, in the policy and procedure manual or otherwise, that expressed this election by the County.

The panel upheld the County's decision to deny medical benefits to Clauer. Because Clauer had insurance under an HMO, the panel found that she had no medical need.

Petition for Judicial Review

Clauer sought judicial review of the November 7, 1994 administrative decision.⁶ Kreimendahl's brief on her behalf argued that the County was obligated under § 49.02(1m), STATS.,⁷ to furnish general relief to eligible persons, and the definition of

⁶ Section 49.037(10), STATS., 1993-94, permits Clauer to appeal the review panel's decision to the circuit court.

⁷ Section 49.02(1m), STATS., 1993-94, provides:

Every county shall furnish general relief to all eligible dependent persons within the county and shall establish or designate a general relief

(continued)

“general relief” in § 49.01(5m), STATS., included “medical treatment” and “medicine” which are “reasonable and necessary under the circumstances.” She had demonstrated a need for medical care assistance because she had no income and needed certain medical treatments and medications.⁸ The County should have either approved her application for medical assistance, explaining what she needed to do to get her medical needs authorized and paid for under the general relief program, or paid the HMO premiums, which it is authorized to do under § 49.043, STATS., as an alternative to paying directly for medical treatment. The brief argued that the County was putting Clauer in a “Catch 22”: it initially denied her eligibility for all types of assistance because of her parents’ income, leaving her no choice but to continue to have her parents pay the HMO premiums as a loan so that she could get the medical care she needed; then, when the County finally acknowledged that her parents’ income was not a bar to her eligibility, it denied her assistance for medical treatment and medicine because she had HMO coverage.

Clauer’s brief cited *Clark v. Milwaukee County*, 188 Wis.2d 171, 524 N.W.2d 382 (1994), in support of her position that the County was putting her in an

agency to administer general relief. The general relief agency shall establish written criteria to be used to determine dependency and shall establish written standards of need to be used to determine the type and amount of general relief to be furnished. The general relief agency shall review the standards of need at least annually. The general relief agency may establish work-seeking rules for general relief applicants and recipients.

Section 49.01(2), STATS., 1993-94, provides:

“Dependent person” or “dependent” means an individual without the presently available money, income, property or credit, or other means by which it can be presently obtained, excluding the exemptions set forth under s. 49.06, sufficient to provide the necessary commodities and services specified in sub. (5m).

⁸ It does not appear that the County took the position that the bills which Clauer submitted were not for reasonable or necessary medical needs.

impermissible “Catch 22” situation. In that case, the court held that a general relief program could not limit shelter payment to those applicants with a paid receipt to show evidence of current need and refuse to recognize a prospective rental statement as evidence of current need. 188 Wis.2d at 184, 524 N.W.2d at 387.

Clauer’s brief also argued that § 49.043, STATS., authorized the payment of health insurance premiums, that the County had no written policy precluding this, and that under the circumstances of this case, the medical insurance premiums were expenses for medical care and medicine that were “reasonable and necessary under the circumstances.” According to Clauer, the County could not rely on its unwritten policy of never paying health insurance premiums, since § 49.02(1m), STATS., required that the County “establish written criteria ... to determine dependency and ... establish written standards of need ... to determine the type and amount of general relief....”

The County argued in its brief, as it had at the administrative hearing, that it was within the County’s discretion under § 49.043, STATS., not to pay health insurance premiums, and it had chosen not to, as part of its cost containment plan, and the state had approved that. Clauer was not being “singled out,” the County contended, because the health insurance premium benefit she requested was simply unavailable in the County. Moreover, Clauer had not shown a need because she had not shown that her parents would discontinue paying or could no longer pay, so the only reasonable conclusion was that they would continue to pay for her health insurance.

The court affirmed the agency’s decision. It concluded that § 49.043, STATS., did not require the County to purchase health insurance for Clauer and that the County had the state’s approval to not purchase health insurance as a cost saving factor. The court held that it was clear and unambiguous that § 49.02(1m), STATS., did not cover insurance premiums. Further, the court reasoned that an applicant for general relief must

show need and under the County's policy, medical expenses are covered as long as the application is approved for payment prior to the applicant incurring them. The court found that the County's policy did not say that under § 49.01(5)(m), STATS., the County must cover the cost for reimbursement of health insurance premiums. The court decided that the County's conclusion that the health insurance premiums were not reasonable and necessary expenses for Clauer was supported by substantial evidence as was the conclusion that her parents' payment of the premiums demonstrated a lack of need for general relief medical benefits.

The County filed a motion for attorney fees and costs pursuant to § 814.025,(3)(b) STATS.,⁹ contending that there was no basis in law or in fact to support Clauer's appeal of the agency's November 7, 1994 decision. After briefing and oral argument, the trial court entered a written decision on September 6, 1995. The court concluded that Clauer's petition for judicial review was frivolous within the meaning of § 814.025(3)(b) because no reasonable basis in law or fact existed for concluding that the

⁹ Section 814.025, STATS., provides in pertinent part:

(1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under section 814.04 and reasonable attorney fees.

....

(3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

....

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense equity and could not supported by a good faith argument for an extension, modification or reversal of existing law.

County had an obligation to reimburse Clauer's health insurance premium payments. The court also concluded that Clauer did not show that a good faith basis existed for extending § 49.043, STATS., to cover the facts of this case. After a later hearing on the amount of attorney fees, the court entered a judgment in the amount of \$3,422.87 against Western Wisconsin Legal Services.

Motions for Relief from Judgment

On December 12, 1995, Kreimendahl wrote to Attorney Margery Tibbetts, the attorney who represented the County in opposing the petition for judicial review and in requesting attorney fees. He informed her that he learned that the general relief program had been paying health insurance premiums for a Mr. Hendrickson. Kreimendahl requested an explanation why that person's premiums were being paid while the County had refused to pay for Clauer's premiums. Tibbetts responded by letter that Hendrickson's case was "like comparing apples to oranges, i.e. it is not relevant to the Clauer matter and has no bearing on the Court's Initial Determination or the issue of frivolous costs."

On January 2, 1996, Kelly, on behalf of Western Wisconsin Legal Services, filed a motion under § 806.07(1)(b) and (c), STATS.,¹⁰ for relief from both the decision

¹⁰ Section 806.07(1)(b) and (c), STATS., provides:

Relief from judgment or order. (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

....

(b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3);

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

and order on the petition for judicial review and the award of attorney fees based on newly discovered evidence that the County had misrepresented certain facts. Kreimendahl attached an affidavit to the motion. The affidavit incorporated a letter from the County to Robert C. Hendrickson informing Hendrickson that the County would no longer pay Hendrickson's health insurance premium after January 1, 1996. In the motion, Kelly argued that the County represented to the court in its brief that it did not pay health insurance premiums for anyone and the court relied on this representation in its decision. The brief in support of the motion argued that § 49.037(10), STATS., allowed the court to take testimony on a petition for judicial review of the agency decision when there was "an alleged irregularity in procedure before the general relief agency," and that was the case here.

The County opposed the motion on the ground that the County, rather than the court, had jurisdiction to consider the motion for relief from judgment. The court agreed with the County and denied the motion, reasoning that under § 49.037(10), STATS.,¹¹ review of an agency decision was based only on the record of the proceedings before the agency, and where there is a claim of new evidence, the agency that made the decision should have the opportunity to first determine whether the new evidence would affect its decision.

The next day, February 7, 1996, Kreimendahl wrote a letter to Tibbetts requesting a "hearing or rehearing to address the denial of [Clauer's] general relief health

¹¹ Section 49.037(10), STATS., 1993-94, provides in part:

An individual . . . who is denied general relief in whole or in part . . . may petition in writing within 30 days after the action, the general relief agency for a review of the action. . . . the general relief agency shall provide a hold a hearing at a date and place and date convenient to the petitioner.

insurance premium benefits. Kreimendahl requested that the letter be treated as a petition under § 49.037(7), STATS. In her response, Tibbetts stated that, "... as the attorney for the County, [she] has no legal authority whatsoever to grant your request for a 'hearing or rehearing.'" She further informed Kreimendahl that under § 49.037(7) his attempt to request a hearing was untimely and the letter was also procedurally defective, therefore his request would not be considered by her client or her. Kreimendahl responded with another letter to Tibbetts explaining that he was under the impression that ethical obligations prevented him from contacting her client directly. He requested that Tibbetts either give him authority to contact John Chrest, director of the Lafayette County's Department of Human Services, or advise Chrest that he was requesting a hearing on behalf of Clauer. Kreimendahl also expressed surprise at Tibbetts' position that the request for a rehearing was procedurally defective, in light of her recent position before the court. He requested that Tibbetts inform him if her client agreed with her position that his request for a rehearing was procedurally flawed.

Tibbetts responded by letter stating simply that "writing the letter to me as attorney for the County in this matter is not procedurally correct," and that he "should file [his] alleged petition for a rehearing with the appropriate agency using proper procedure." Kreimendahl wrote to Chrest on February 15, 1996, enclosing the correspondence with Tibbetts and asking that it serve as his request for a rehearing. On February 16, 1996, Chrest wrote to Kreimendahl and informed him that the statutes Kreimendahl cited in his initial letter to Tibbetts were no longer in effect as of January 1, 1996; that his agency no longer had a general assistance program; that the agency had not denied Clauer any benefits within the last thirty days, referring to § 49.037(7), STATS., 1993-94; and he saw no reason to schedule a hearing. This letter was copied to Tibbetts.

Kreimendahl responded to Chrest in a letter dated February 22, 1996, in which he stated that his request for a rehearing was based on his view that Clauer was

entitled to a rehearing of the November 7, 1994 panel decision based on newly discovered evidence and that the County's counsel stated to the court that she thought additional administrative rehearing procedures were appropriate in this case. Kreimendahl stated the specific basis for the rehearing was "that your agency denied Ms. Clauer health insurance premium coverage under general relief though granting it to other Lafayette County recipients." Kreimendahl explained that the request for a rehearing "is based on the law under Chapter 49 that your agency was bound by as of the time the original denial and appeal took place."

Chrest's response to Kreimendahl's February 22, 1996 letter was dated March 11, 1996. In that letter, Chrest stated that the County had no authority or responsibility to reopen a general relief appeal once a case has been through the review process set forth in § 49.037, STATS., and a final decision has been rendered. The letter stated that Clauer's application was denied for three reasons: (1) she did not request payment of the health insurance premiums on her application or until the November 7, 1994 hearing and therefore retroactive payments for the premium could not be based on the February 9, 1994 application; she would have to make a new application with any eligibility starting on the date of that application; (2) she did not have any medical need and still had none; and (3) payment of health insurance premiums under § 49.043, STATS., is discretionary. The letter also stated that the request for a new hearing based on new evidence was denied because the new evidence did not change any of the three reasons for denial. Chrest distinguished the facts of Hendrickson's case: Hendrickson requested emergency medical assistance and Clauer requested non-emergency; Hendrickson was going to accumulate huge emergency medical bills in the future "vs. Clauer having no bills"; Hendrickson had a possible disability and had applied for SSI "vs. Clauer had no active or chronic condition"; Hendrickson "had health insurance available through prior employment that would cover the existing cost and future cost

associated with the emergency medical case “vs. Clauer did not request insurance payment at the time of application.” Chrest explained why the agency no longer paid for the Henrickson’s health insurance and ended the letter with: “We feel this falls within agency discretion upheld by the Statutes and the Court.”

On March 12, 1996, Kelly filed a motion with the court requesting that the court grant relief from the court’s February 8, 1996 order denying the previous motion for relief from judgment and repeating the earlier request for relief from the order affirming the agency decision and the award of attorney fees. The motion was dated March 8, 1996. The motion, brief and affidavit repeated the arguments presented in favor of the earlier motion for relief from judgment and further explained that the County would not schedule further proceedings. Kreimendahl’s affidavit, signed and notarized on March 8, 1995, was attached to his February correspondence with Tibbetts and Chrest.

The County opposed the motion. It argued that the court lacked jurisdiction to hear or consider Kelly’s motion because § 49.037(10), STATS., provides that review of the relief agency is “confined to the record and nothing in Chapter 49 provides the court with authority either to reopen a decision by the general relief board denying an applicant benefits and order a new hearing or to review a general relief board’s denial of a motion to reopen.” The County also argued that the decision to pay Hendrickson’s health insurance premiums did not in any case warrant a rehearing because of the differences between his situation and Clauer’s.

The court held an evidentiary hearing on the motion to reopen. Chrest testified consistent with his March 11, 1996 letter to Kreimendahl, but in more detail, explaining how the County provides non-emergency and emergency medical assistance under its general relief program. He testified that before his March 11, 1996 letter, he had never informed Kreimendahl that under some circumstances health insurance

premiums could be paid. Kreimendahl testified that he did not know of nor did he receive any policy from the County with regard to whether the County paid medical insurance premiums; to his knowledge Clauer did not either; he attempted on more than one occasion to discover evidence of the County's policy of not paying medical insurance benefits for general relief recipients through Chrest and Tibbetts and was unsuccessful.

On July 19, 1996, the court denied the motion for relief from judgment. The court concluded that "there is no newly discovered evidence" entitling Clauer to a remand by this court to the County because the payment of health insurance premiums in Hendrickson's case arose out of an entirely different set of facts than existed in Clauer's case. The court also concluded that the County did not misrepresent its policy. The court found there was no reason to grant relief from the judgment dismissing the petition for review or the judgment awarding attorney fees.

The County filed a motion under § 814.025, STATS., for costs and fees incurred in defending the motions to reopen.¹² At the hearing on the motion, the parties agreed that the transcript of Chrest's testimony from the hearing on the second motion to reopen could substitute for a repeat of his live testimony. Kreimendahl testified that based on the County's position at the November 7, 1994 administrative hearing and the County's statements in its brief to the court supporting affirmance of that decision, it was

¹² The motion states that it is brought under § 802.05, STATS., in addition to § 814.025, STATS. Section 802.05 provides for the imposition of certain sanctions, including reasonable attorney fees, when an attorney signs pleadings and other papers without first making certain inquiries. However, at the hearing on the motion, the attorney for the County stated, in response to the question of the court, that the motion was brought under § 814.025 and that was the only section it was brought under. Section 814.025 was the only statute the County's counsel referred to in argument. The trial court does refer to § 802.05 as well as § 814.025 in its written decision. However, the judgment expressly states that the attorney fees are awarded pursuant to § 814.025, even though it describes the motion as brought under both statutes. We therefore do not separately address whether the County was entitled to attorney fees under § 802.05 regarding the motions to reopen. However, for the reasons we explain with respect to § 814.025, our decision would be the same if the award was made under § 802.05.

his understanding that the County's position was that they never paid for health insurance benefits. He described, primarily with reference to the correspondence already noted, his efforts to learn why the County was paying for Hendrickson's health insurance benefits when it would not pay for Clauer's; his efforts to obtain a hearing or rehearing from the agency after learning about Hendrickson's situation; and the investigation, legal research and conclusions he came to at various points regarding the motions to reopen. Kelly also testified, explaining his role in the decisions and actions regarding the motions to reopen. Kelly requested permission to question Tibbetts to establish that her conduct was in bad faith because she refused to respond to the efforts of Western Wisconsin Legal Services to obtain information relative to the motion to reopen. Tibbetts objected to Kelly's request on the ground of "attorney/client work product" and because she received no notice. The court denied the request to question Tibbetts, concluding that there was no relevant evidence that she could provide.¹³

The court granted the County's motion for attorney fees. The court found that a reasonable attorney would have concluded there was no legal basis for asking the court to reopen the judgments and take additional evidence. The court also concluded that Chrest's March 11, 1996 letter clearly spelled out the differences between Hendrickson's case and Clauer's case, and a reasonable attorney would have known based on that, with any reasonable inquiry, that there was no factual basis for the claim of newly discovered evidence. The court also repeated its earlier conclusion that the petition for judicial review was frivolous, adding that a reasonable attorney would have concluded that he or she could not amend the application at the November 7, 1994 administrative hearing to ask for benefits (payment of health insurance premiums) not

¹³ Because it is unnecessary to our decision, we do not address the appellants' argument that the trial court erred in not permitting Kelly to question Tibbetts.

requested on the application. The court entered judgment against Western Wisconsin Legal Services and Kreimendahl in the amount of \$3,553.65 for fees and costs incurred by the County in connection with the motions for relief from judgment and against Western Wisconsin Legal Services and Kelly in the amount of \$1,108.88 for fees and costs incurred by the County in defending against the motion for attorney fees.

DISCUSSION

A claim is frivolous and entitles the moving party to costs and attorney fees if the other party's attorney or the other party knew or should have known that the claim had no reasonable basis in law or in equity, and could not be supported by the good faith extension, modification or reversal of existing law. *Stern v. Thompson & Coates, Ltd.*, 185 Wis.2d. 220, 240-41, 517 N.W.2d 658, 665-66 (1994). *See also Kelly v. Clark*, 192 Wis.2d 633, 654, 531 N.W.2d 455, 462 (Ct. App. 1995). Whether the attorney knew or should have known that the position taken was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances is based on an objective standard. *Stern* at 241, 517 N.W.2d at 666. This is a mixed question of law and fact. *Id.* The trial court determines what the facts are when determining what an attorney would or should have known with regard to the facts, and the trial court's findings of fact will not be overturned on appeal unless they are clearly erroneous. *Id.* However, whether knowledge of those facts would reasonably lead an attorney to conclude the claim is frivolous is a question of law. *Id.*

We must resolve all doubts in favor of finding a claim nonfrivolous. *Id.* at 235, 517 N.W.2d at 663. This is because an attorney has an obligation to represent his or her client's interest zealously, and this may include making some claims which are not entirely clear in the law or facts, at least when commenced. *Id.* The fact that a party may

not succeed on a claim does not make the claim frivolous. *Id.* at 244 n.9, 517 N.W.2d at 667 n.9.

Petition for Judicial Review

We first consider the court's award of attorney fees regarding the petition for judicial review. We disagree with the trial court that Kreimendahl knew or should have known that the petition for judicial review of the November 7, 1994 decision had no reasonable basis in law or in equity.

The general relief statute, §§ 49.001-49.043, STATS., 1993-94, established in general terms counties' obligations for general relief, and there has been little published case law further defining those obligations outside of the context of emergency medical care. Section § 49.02(6r), STATS., provides that, except as provided in subsec. (5), no county is liable for medical treatment or hospitalization unless the agency first gives proper authorization or certifies the provider, and subsec. (5) provides a detailed scheme for the county's liability for emergency hospitalization and care. Neither the parties nor the trial court cited to any decisions interpreting the counties' obligation under § 49.01(5)(m) to provide "medicine" and "medical services" as "are reasonable and necessary under the circumstances" or the manner in which the counties are to determine eligibility or need for non-emergency medical services. We could not find any. Whether Kreimendahl's appeal of the agency's decision had no reasonable basis in law must be judged in this context.

The trial court concluded that it was clear that the County's obligation to provide medical services under § 49.01(5m), STATS., did not include payment for health insurance premiums under the circumstances of this case. That was the issue on the petition for judicial review. However, the issue on the motion for attorney fees is: is there a reasonable basis to argue that that section, read in conjunction with the County's

authority to pay for health insurance premiums under § 49.043, STATS., requires the County to pay for Clauer's premiums from February through September 1994 under the circumstances of this case?

The pertinent circumstances, as argued by Kreimendahl, were the following. The County initially denied Clauer general relief in February 1994 for the stated reason of household income, which was later, apparently, determined to be an improper basis for the denial of all assistance. On her application, she requested medical benefits but did not request payment for the health insurance premium because she did not want to continue to borrow money from her parents for the health insurance premiums. Rather she asked the County to meet her medical needs. Because the letter denying her general relief benefits said nothing about her eligibility for medical benefits, except that "she might in the future be eligible for emergency medical benefits," it was not unreasonable for her to continue to have her parents pay the premiums while the issue of her household income was being resolved. Eventually, the issue was resolved in her favor although it took a number of months.

Clauer did not argue that § 49.01(5m), STATS., read in conjunction with § 49.043, STATS., requires the County to cover health insurance premiums for all eligible persons, instead of covering prior authorized non-emergency medical care. Rather, she argued that under these circumstances it was the County's action—their denial based on household eligibility and failure to mention anything about her eligibility for non-emergency medical assistance in the letter of denial or explain in any materials how to obtain non-emergency medical assistance—that prevented her from obtaining preauthorization for the medical care and medications she needed between February and September 1994. In the absence of any case law interpreting the pertinent statutory sections, we cannot conclude that the interpretation Clauer advanced was unreasonable. Because the County under § 49.043 has the discretion to provide payment for health

insurance benefits, it does not follow that it is unreasonable to argue that in certain situations the County must do so in order to meet its obligation to provide the services required under § 49.01(5m).¹⁴

The trial court also concluded that Clauer had no reasonable factual or legal basis for contending that she needed assistance for medical care because her parents were paying for her health insurance premiums. The court acknowledged that if Clauer had presented her medical bills at the time of her application, established a reasonable basis to conclude that she was eligible at that time for those benefits, was improperly denied, and then got insurance to cover her medical expenses, there would be a reasonable basis for an argument that the County was obligated to pay for those premiums. However, we observe that the issue of “need” would still be present in that situation, because those premiums were somehow being paid, and, as long as they could somehow be paid, one could argue there was no need for the general relief program to provide assistance for medical care. The underlying issue in both situations is a difficult one: how a person with no income and assets of his or her own can demonstrate a need for purposes of general relief eligibility if another person, with no legal obligation to do so, provides for that need based on a loan because the person is not receiving general relief. The statute does not address this issue, except through the definition of dependency, *see* § 49.01(2), STATS., 1993-94,¹⁵ the case law does not address it, and the County has not shown that it has any policy that addresses this issue.

¹⁴ The state-approved plan, which was relied upon by the County at the November 7, 1994 administrative hearing and by the court in its affirmance of the agency decision, was not introduced by the County until a hearing on the motion to reopen. This plan does not mention health insurance payments at all. That may mean, as the County argued, that it had not undertaken to pay for them. But the plan does not preclude the County from doing so.

¹⁵ *See* footnote 7.

There are additional difficulties with the trial court's conclusion that Clauer had no reasonable basis for arguing that she needed assistance from general relief for medical care. After reviewing the entire record, we are unable to say how any applicant with no income or assets could have established a need for non-emergency medical care. The trial court states that presentation of bills is needed for this, and that is what Chrest says in his letter of March 11, 1996. However, the policy given to Clauer states that the County does not pay bills. Chrest explained in his testimony on the motion to reopen that by showing medical need with "bills," he meant that an applicant would have to show the existence of a medical condition that needed treatment, and Clauer never showed that. In summary, just what Clauer had to do to demonstrate non-emergency medical need was not stated in the notice of denial, even though she requested medical assistance; was not explained in the information she was given when she applied; and is not clear from the County's later explanations.

When the County denies an application for relief, it is obligated to give written notice that contains the specific reasons for denial and a statement of the evidence and policy relied on in making the determination. Section 49.037(5), STATS., 1993-94. Also, the County "must have written criteria to ... determine dependency" and "written standards of need ... to determine the type and amount of general relief...." Section 49.02(1m), STATS.

In *Clark*, the supreme court held that "any policy directive regarding the general relief shelter allowance established by the [Milwaukee] County must inform all applicants that either a prospective rental statement of a current rent receipt is acceptable to prove the need for shelter allowance." 188 Wis.2d at 184, 524 N.W.2d at 387. If Milwaukee County chose to recognize other forms of proof to secure the shelter allowance, "a full description of the means of proof must be in writing and provided to all shelter applicants." *Id.* at 184 n.9, 524 N.W.2d at 337 n.9. The supreme court held it was

not acceptable for Milwaukee County to have a practice of providing a shelter allowance if certain forms of proof of need were presented that were not explained in writing to applicants. *Id.* at 185, 524 N.W.2d at 388. Based on the court's interpretation of the same statute in *Clark*, it was not unreasonable for Kreimendahl to argue that the County was obligated to explain to Clauer how she could establish medical need, or why she had not established medical need. It was also not unreasonable to argue that, since the County did not do so, it was precluded from later arguing that she had not shown medical need in her application.

In its second decision awarding attorney fees, the court revisited the issue of the frivolousness of the petition for review and stated that a reasonable attorney should have concluded that he or she could not make a request for payment of health insurance premiums at the November 7, 1994 hearing when the February 9, 1994 application did not contain such a request. However, as we have explained, Kreimendahl's argument that the County was obligated to pay for the cost of the premiums incurred from February through September was premised on the County's denial of Clauer's request for medical assistance during that time period. This, in Kreimendahl's view, was an incorrect denial. The record of the hearing does not reflect that anyone told Kreimendahl that the County could not pay for those premiums because it was not requested on the application. The reason given at the hearing was that the County had elected not to do so for anyone. The record does not show that either Clauer or Kreimendahl was informed that Clauer had to make a new application until Chrest's March 11, 1996 letter. In addition, it is not at all apparent why a new application for payment of health insurance premiums is needed in order to request such payment as a remedy for a denial of an earlier application, when the remedy for the earlier denial is the subject of the hearing. Indeed Chrest testified that a new application would cover only health insurance premiums after the date of the new application. For these reasons, we conclude that a reasonable attorney would not have

concluded that it was frivolous to ask for payment of the health insurance premiums from February through September at the November 7, 1994 hearing without first making a new application.

Motions for Relief from Judgment

In determining that the first motion to reopen was frivolous, the court first concluded that no authority existed for “the court to sit in the place of the administrative agency and receive evidence [and] any reasonable attorney would know such application for review had to be addressed to the agency.” We disagree.

There is no provision in the general relief provisions of ch. 49, STATS., for a rehearing before the agency. The only provision on judicial review provides as follows:

(10) Appeal of the decision under sub. (9) is to the circuit court. The review shall be conducted by the court without a jury and shall be confined to the record, except that in case of an alleged irregularity in procedure before the general relief agency, testimony on it may be taken in the court. If leave is granted to take this testimony, depositions and written interrogatories may be taken as set forth in ch. 804 before the date set for the hearing if proper cause is shown for doing so.

Section 49.37(10), STATS., 1993-94. There is no reported case law discussing this subsection, and none that addresses the proper procedure for a general relief applicant in this situation.

The County’s position in opposition to the first motion to reopen was that § 806.07(b) and (c), STATS., did not apply because this was an appeal on the record under § 49.037, STATS., and the rehearing procedures of § 227.49, STATS., applied. Section 227.49(1) requires that a petition for rehearing be filed with the agency within twenty days of service of its written order.

In support of the motion to reopen, Kreimendahl presented several alternative legal theories, set forth in his brief and in his argument at the hearing. He argued that the County's representatives at the November 7, 1994 hearing misrepresented the County's policy for paying health insurance premiums. This, Kreimendahl contended, was a procedural irregularity under § 49.037(1), STATS., on which the court had the discretion to take evidence. He also argued, that it was appropriate to analogize to similar agency appeals since there was no pertinent case law on judicial review or rehearings of general relief agency decisions. Pointing to § 59.99(10), STATS., which permits the circuit court to take additional evidence in zoning appeals "when it appears necessary for the proper disposition of the appeal," Kreimendahl argued that the case law interpreting that provision would permit the court to take evidence in this situation.¹⁶ Finally he argued that, since the County was not a state agency, ch. 227, STATS., did not apply, and therefore the rehearing provisions of that chapter, § 227.49, STATS., did not apply, nor did the case law that did not permit resort to § 806.07, STATS., when it

¹⁶ *Klinger v. Oneida Co.*, 149 Wis.2d 838, 847, 440 N.W.2d 348, 351-52 (1989), describes these circumstances:

When the record before the Board is incomplete because the aggrieved party was refused an opportunity to be fully heard or the Board excluded relevant evidence; when good and sufficient cause is shown for the failure to have offered the evidence to the Board; when the record presented to the circuit court does not contain all of the evidence actually presented to the Board; when the Board's record fails to present the hearing in sufficient scope to determine the merits of the appeal; and when new evidence is discovered after the Board's proceedings were closed.

conflicted with ch. 227.¹⁷ He requested that the judgment be reopened and that either the trial court take new evidence or remand the matter to the administrative agency. The materials submitted in support of the motion also made clear that Clauer was contending not only that the County's representatives misrepresented the County policy at the November 7, 1994 hearing, but that the County's attorney repeated that misrepresentation before the court. And, the court relied on the misrepresentations in its decisions affirming the agency decision and awarding attorney fees.

Given the minimal statutory law and the lack of case law on the proper procedure a general relief applicant should follow in this situation, we cannot conclude that the motion to the court to either take evidence or remand to the agency was without a reasonable basis in the law. The County attorney acknowledged to the court at the hearing on the first motion that:

MS. TIBBETTS: Your Honor, it's a confusing issue. Chapter 49 gives no authority to the court and it gives no authority to the administrative agency to reopen one of these general relief determinations. We had argued that Chapter 227 states in a situation like this that the administrative agency, not the court, should hear a motion for a new hearing based on newly discovered evidence.

¹⁷ This court held in *Charter Mfg. v. Milwaukee River Restoration Council, Inc.*, 102 Wis.2d 521, 525, 307 N.W.2d 322, 324 (Ct. App. 1981), that § 806.07(1)(g) and (h), STATS., (providing for relief from a judgment “when it is no longer equitable that the judgment should have prospective application and “for any other reason justifying relief,” respectively) did not permit a court to grant relief from judgment entered under a ch. 227, STATS., review because ch. 227 provided a comprehensive, fully defined procedure for judicial review of agency decisions. The later supreme court case, *State v. Walworth County Circuit Court*, 167 Wis.2d 719, 727, 482 N.W.2d 899 (1992), stated that there was no across-the-board prohibition on the civil procedure statutes (chs. 801 to 847, STATS.) applying ch. 227 appeals; it depended whether the particular civil procedure conflicted with the procedures in ch. 227. The supreme court approved the result in *Charter Mfg.* because the record there had not been fully developed before the agency. 167 Wis.2d at 730-31, 482 N.W.2d at 904. The supreme court in *Walworth* also noted that, although we held in *Chicago & N.W.R.R. v. Labor & Ind. Rev. Comm'n*, 91 Wis.2d 462, 283 N.W.2d 603 (Ct. App. 1979), *aff'd on other grounds*, 98 Wis.2d 592, 297 N.W.2d 819 (1980), that § 806.07(1)(b), STATS., was not available in a ch. 227 judicial review, the supreme court did not affirm on that ground. 167 Wis.2d at 728, 482 N.W.2d at 903. Rather, the supreme court affirmed on the ground that the newly discovered facts were not truly “newly discovered,” and “therefore did not precluded the application of sec. 806.07 (1)(b) to ch. 227 judicial reviews.”

Kreimendahl was correct that ch. 227, STATS., did not apply, since it applies only to agencies in the state government. *See* § 227.01(1), STATS. It was not unreasonable to assume that there had to be some mechanism to bring the new information he had obtained before either the agency or the court.¹⁸ Given that ch. 49, STATS., did not provide for a rehearing before the agency, and in the absence of any case law to the contrary, it was not unreasonable to first bring a motion before the court to resolve that issue. Although the cases discussing § 806.07, STATS., and ch. 227 may have been persuasive as analogies, as the court apparently concluded they were, the arguments based on an analogy to another statute governing review of a local agency decision were not foreclosed by any case law. Moreover, under § 49.037(10), STATS., “irregularity in procedure” at the administrative hearing could reasonably be interpreted to include an alleged misrepresentation of the County’s policy by a County representative, even though the court apparently concluded that it was more reasonable to interpret that language narrowly. Finally, the fact that the County’s attorney made the alleged misstatement to the court during the judicial review, distinguishes this case from any of the ch. 227 cases discussing § 806.07, none of which considered § 806.07(c).

The trial court also concluded that a reasonable attorney would not have brought either motion to reopen because a reasonable attorney would have known that the facts of Henrickson’s case were completely different from Clauer’s case and therefore the new information about the County’s policy with respect to paying health insurance premiums would not warrant a different result in Clauer’s case. Given the County’s

¹⁸ We do not understand the trial court to have decided that the second motion to reopen was frivolous because the court did not have the authority at that point to decide the motion. The second motion was brought after the County denied the request for rehearing and the court held an evidentiary hearing on the merits of the second motion.

actions preceding both the first and second motion to reopen, we cannot agree with the trial court.

A County representative at the November 7, 1994 hearing stated that, although the County may pay for insurance under the statute, “it had elected not to pay insurance premiums as part of county general relief cost containment plan which was submitted and approved by the state.” This statement was a basis for the agency’s decision. In the County’s brief opposing the petition for judicial review, counsel pointed to this statement at the hearing as “uncontradicted evidence in the record that the County of Lafayette elected not to purchase health insurance premiums pursuant to sec. 49.043.” The court referred to this and to the state’s approval of the County’s plan in concluding that the agency had acted according to law. The County’s attorney elaborated on this point in the brief in support of the first motion for attorney fees:

Petitioner appealed the County’s denial of her request that the County pay her private HMO insurance premiums. Section 49.043, Wis. Stats., unambiguously provides that counties MAY purchase health insurance for unemployed persons residing in the municipality. However, there is absolutely nothing in the statute or case law which requires the county to do so. The facts in the record are undisputed that Lafayette County made the decision pursuant to § 49.043 not to pay insurance premiums for such persons. As the court indicated in its decision, that decision was totally within the county’s discretion. Prior to filing her Petition for Review in this matter, Petitioner and her attorney were well aware of the facts and the county’s regulations. In addition, Petitioner and her attorney were fully aware that the county’s policy existed and that it had been submitted to and proved in the state. They knew that there was no legal requirement in existence to force the county to pay Petitioner’s HMO insurance premiums. With that knowledge, Petitioner and her attorney frivolously continued this action.

The trial court in its decision on this motion determined that it was unreasonable to bring the petition for judicial review because the County had the discretion to pay or not pay for health insurance premiums under § 49.043, STATS. The court noted that the petitioner knew that the County had exercised its discretion to not provide insurance. Based on this

record, we conclude that the existence of the County's policy not to pay for health insurance premiums was material to the decision before the agency, to the court's decisions dismissing the petition for judicial review, and to the court's decision granting fees and costs.

We also conclude based on the undisputed facts of record that Kreimendahl did not know that the County paid anyone's health insurance until he learned that the County paid for Hendrickson's in December of 1995. There is nothing concerning health insurance premiums in the materials provided Clauer when she applied or in the County's general relief policies on the record. Indeed, the absence of any reference to health insurance premiums in the County's written policy was one reason why the trial court concluded that Kreimendahl should have known they were not covered. The state-approved plan the County referred to as evidence of its policy was presented at the evidentiary hearing on the motion to reopen. That plan does not mention payment of health insurance premiums. Chrest explained that this is because the plan says what the County will cover, not what it will not cover. Although this is a reasonable explanation for the absence of any reference to health insurance premiums in the plan, this absence also shows that there was no way for someone in Kreimendahl's position to know that the County did pay health insurance premiums for anyone until he learned of Hendrickson's case.

We further conclude that it was reasonable for Kreimendahl to view what he learned about Hendrickson as inconsistent with the County's representations of its policy on paying health insurance premiums. And, because the court based its decision on the petition for judicial review and the first award of attorney fees on the existence of a policy of *not* paying health premiums, it was reasonable to conclude that if that was not the County's policy, there was a basis for a re-examination of those decisions. When Tibbetts declined to explain the basis for the different response to Hendrickson in any

significant way, it was reasonable for Kreimendahl to pursue the issue with a motion. The record discloses no way that Kreimendahl could have learned of the County's reasons for its actions unless the County explained them to Kreimendahl, since it had no written policy on the subject.¹⁹

Kreimendahl's efforts to obtain a hearing or rehearing after the court denied the first motion to reopen did not result in any more substantive information until Chrest's letter of March 11, 1996. It is unclear from the record whether Kreimendahl received that letter before the second motion to reopen was filed on March 12, 1996. However, it is clear that both the motion and Kreimendahl's affidavit in support were prepared before March 11. If Kreimendahl had not received the letter before filing the second motion, we conclude it was reasonable to file the motion and reasonable to pursue it even after receiving the letter. If he received Chrest's letter just before Kelly filed the motion, we nevertheless conclude that filing the second motion was reasonable.

An action which initially is not frivolous may become frivolous if the party or his or her attorney learns "that the action is without any basis in law or equity and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." *Kelly v. Clark*, 192 Wis.2d 633, 655, 531 N.W.2d 455, 462 (Ct. App. 1995). However, conflicting versions of the facts are standard fare in litigation and there is no reason why an attorney should accept the other side's version of the facts. *Blankenship v. Computers & Training, Inc.*, 158 Wis.2d 702, 710, 464 N.W.2d 918,

¹⁹ Kreimendahl learned of Hendrickson's case because he was representing him. When he realized that the facts of Hendrickson's case might be relevant to Clauer's case, he withdrew as Hendrickson's counsel. As Chrest emphasized during his testimony, information about the situation of each relief applicant is confidential. If Chrest felt he could not disclose the details of Hendrickson's case without Hendrickson's permission, we do not see how Kreimendahl could have obtained them. Moreover, the issue is what the County's reasons were for paying Hendrickson's health insurance premiums and not paying for Clauer's. It was the County, not Hendrickson, who knew that.

921 (Ct. App. 1990). The County was unresponsive to Kreimendahl's numerous requests for information. Although Chrest's March 11, 1996 letter finally explained differences in the two cases that might justify different treatment, the letter did not explain how that was consistent with the County's previously stated policy of not paying any health insurance premiums. A reasonable reading of the letter is that the County pays health insurance premiums within its discretion. But that is not what the County or its attorney earlier represented the policy to be. In the absence of any written policy the County could point to, it was reasonable for Kreimendahl to pursue the motion rather than accepting Chrest's explanation at that point. The fact that the court determined that the differences in Hendrickson's and Clauer's cases were such that the County's response to Hendrickson was not inconsistent with its denial of Clauer's request for payment of health insurance premiums does not mean it was unreasonable for Kreimendahl, under all the circumstances of this case, to file and pursue the motions to reopen.²⁰

By the Court.—Judgments reversed.

Not recommended for publication in the official reports.

²⁰ The trial court and the parties discuss the second part of the test for frivolousness—whether the positions of Kreimendahl and Kelly were supported by a good faith argument for an extension, modification or reversal of existing law. See *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis.2d 605, 612, 345 N.W.2d 874, 878 (1984). However, a court need only reach this issue if it concludes that the party did not have a reasonable basis in law and fact for its position. *Id.* It is unnecessary for us to address the second part of the test because we have concluded that Kreimendahl and Kelly had a reasonable basis in fact and law for the petition for review and the motions to reopen. When there is no case law interpreting a statute, we do not view a proffered interpretation of the statute as an effort to extend the law; rather, the issue is whether the proffered interpretation is a reasonable interpretation.

